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OGC 70-0776

OGC Has Reviewed

15 May 1970

MEMORANDUM FOR: Chief, Transactions & Records Branch, Office of Personnel

SUBJECT: Leave Accrual - Creditable Military Service in Determining Proper Leave Earning Categories for Retired Military Personnel

1. You have, by memorandum dated 20 April, requested our opinion as to whether time served by a retired member of a uniformed service at a military service academy is creditable service for leave accrual purposes. You state that two cases have recently been referred to your office for determination. You have provided, with regard to these cases, the following facts: In both cases the individual is a staff employee. In the first case, the employee retired from military service (for length of service) effective 30 June 1965 and entered on duty with the Agency the next day, 1 July. He is a graduate of the Naval Academy at Annapolis, having attended from 1930 through 1934. In the second case, the employee retired from military service (for length of service) effective 30 April 1967 and entered on duty with the Agency on 7 May of the same year. He is a graduate of West Point, having attended from 1933 through 1937.

2. You state that shortly after these retired officers were employed by the Agency, a computation was made which allowed credit for the time spent at the service academies on the theory that such time was creditable since the subjects' military annuity was based on their service exclusive of the four years spent at the service academy.

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3. [redacted] provides that staff personnel are afforded leave benefits as provided in the Annual and Sick Leave Act of 1951, as amended. Section 203 of the Dual Compensation Act approved August 19, 1964, Public Law 88-448, amends section 203(a) of the Annual and Sick Leave Act of 1951, 5 U.S.C. 6303(a), to provide, in relevant part, that "active military service" of a retired member of any of the uniformed services is not creditable in determining years of service for the purpose of leave accrual unless the member meets one of the three conditions specified in the section.

4. These three conditions as set out in 5 U.S.C. 6303(a) are more clearly presented with explanation in Subchapter S210-5 of Appendix B, Federal Personnel Manual Supplement 296-31, as follows:

> e. Retired members of uniformed services.
>
> (2) Leave accrual rate. For leave accrual purposes, credit is restricted to the retired member's actual active service in the armed forces during wartime (for example, time actually served between December 7, 1941, and April 28, 1952, inclusive) or in any campaign or expedition for which a campaign badge has been authorized (for example, time after April 28, 1952, actually served in Korean Service, through July 27, 1954; service from 12-15-66 to 1-1-69 covered by a Vietnam Service Medal awarded the retired member), unless the retired member meets one or more of the three conditions listed below. If he meets any of these conditions, all of his active service is counted for leave accrual purposes:
>
> (a) His retirement was based on disability resulting from injury or disease received in line of duty as a direct result of armed conflict; or

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(b) His retirement was based on disability caused by an instrumentality of war and incurred in the line of duty during a period of war (as defined in sections 101 and 301 of title 38, United States Code); or

(c) On November 30, 1964, he was employed in a civilian office to which the annual and sick leave law applied, and he continues to be employed in any office of this kind without a break in service of more than 30 days.

It should be noted that the Comptroller General has held that the term "active military service", as used in 5 U.S.C. 6303(a), is synonymous with the term "active service", as defined in 37 U.S.C. 101. 44 Comp. Gen. 534 (1965). 37 U.S.C. 101(18) and (20) define active service as "...full-time duty in the active service of a uniformed service, and includes duty on the active list, full-time training duty, annual training duty, and attendance, while in the active service, at a school designated as a service school by law or by the Secretary concerned;...."

5. Given the above, an employee who meets any one of the conditions set out in subparagraphs (a), (b) or (c) in the above cited FPM section shall have counted for leave accrual purposes all of his active service including that time served as a cadet or midshipman at a service academy regardless of when that time was served. If the employee fails to meet these conditions, credit for such military academy time is restricted to that actually served during wartime or in any campaign or expedition for which a campaign badge has been authorized. For practical purposes, this means campaign or expeditionary service before December 7, 1941, and after April 28, 1952, since service between these dates is wartime service and is creditable regardless of where served. Service in a nonwartime campaign or expedition does not entitle the retired member to receive credit for the duration of the campaign or expedition, but only for the period of his service in the campaign or expedition as indicated by the official military records. See Subchapter S210-5e(6), Appendix B, FPM Supplement 296-31.

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6. With regard to the two specific cases presented for determination, neither employee meets the conditions for including all his active service, and is therefore restricted to that served during wartime or in a campaign or expedition. Since the questioned military academy activity occurred during the 1930's, it is not properly creditable for leave accrual purposes.

7. The Comptroller General has held, in an unpublished decision (B-166848, 3 June 1969) involving an employee erroneously placed in a higher leave category than actually entitled to, that the pay which was allowed for days the employee was placed on annual leave in excess of the total annual leave which should have been credited during the leave year, is properly subject to consideration for waiver if otherwise appropriate under 5 U.S.C. 5584 and the regulations issued pursuant thereto. In this regard, see [redacted] 25X1A

[redacted] 25X1A

Office of General Counsel

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20 April 1970

MEMORANDUM FOR: Office of General Counsel

SUBJECT : Dual Compensation Act

We are requesting a formal legal opinion on that portion of the Dual Compensation Act which applies to the amount of military service that can be utilized in determining proper leave earning categories.

This particular question involved has been researched in the Federal Personnel Manual and it was also referred to the Civil Service Commission.

The issue is whether or not the time served by a retired (for length of service) military or naval officer at the Military or Naval Academy as a Cadet or Midshipman can be construed as being creditable service for leave accumulation purposes.

Two cases have recently been referred to this office for determination. Each of these individuals is a graduate of one of the service schools. They attended during the 1930's and, of course, this was not during World War II, nor were they participating "in any campaign or expedition for which a campaign badge has been authorized". From my research of the Federal Personnel Manual (FPM Supplement 296-31, Appendix B, Subchapter S210-5) and from my conversation with the Civil Service Commission it appears that the academy time (during the 1930's) cannot be used in computing total service for leave purposes.

Shortly after these retired officers were employed by the Agency a computation was made which allowed credit for the type service in question. The theory employed at the time was that it was creditable since the subject's military annuity was based on their service exclusive of the four years spent at the Academy.

In researching these cases I discovered a letter dated 26 January 1968 written by the Assistant Comptroller General to the Chairman of the Civil Service Commission concerning a different question on a dual compensation matter (copy attached). In the underlined portion of the letter it is pointed out that the intent of Congress

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was to disallow the circumstance of an officer enjoying retirement benefits and the benefits of a civilian position based on time served in the uniformed service.

In view of my interpretation of the above and the fact that the individuals in question are not receiving retirement benefits based on the four years of school, might this be a technical point which would allow such credit to be used in the determination of leave categories?

We would appreciate clarification of this point so that proper record adjustments can be made for these two retired officers and for any other of our employees who might be included in this type situation.

1. Is my assumption correct that the period spent at the service academies prior to World War II is not creditable for leave accumulation purposes?

2. If the answer to question one (1) is yes, should we extend this reasoning so as to exclude, for leave accumulation purposes, credit for time spent at the service academies during the statutory dates of World War II (7 December 1941 - 28 April 1952)?

3. If the answer to questions one (1) and/or two (2) is yes, and where an adjustment to the Service Computation Date must be made and as a consequence certain monies become due the Government, would this be proper matter for waiver of reimbursement under [redacted]?

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If we may be of further assistance or if the particular cases have to be reviewed, please call me on extension [redacted]

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Chief, Transactions & Records Branch
Office of Personnel

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COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

B-136412

January 26, 1968

Dear Mr. Macy:

We refer to your letter of December 11, 1967, requesting our advice upon the question whether an employee who is a retired serviceman and who is precluded from counting active military service for annual leave accrual purposes under 5 U.S.C. 6303(a) is entitled to count up to five years of a period during which he is in the active military service as a part of his "civilian service" in determining his annual leave-earning category under the authority of 5 U.S.C. 8332(g).

5 U.S.C. 8332(g) is as follows:

"An employee who during the period of a war, or of a national emergency as proclaimed by the President or declared by Congress, leaves his position to enter the military service is deemed, for the purpose of this subchapter, as not separated from his civilian position because of that military service, unless he applies for and receives a lump-sum credit under this subchapter. However, the employee is deemed as not retaining his civilian position after December 31, 1956, or after the expiration of 5 years of that military service, whichever is later."

5 U.S.C. 6303(a) is in part as follows:

"§6303. Annual leave; accrual

* * * * *

"In determining years of service, an employee is entitled to credit for all service creditable under section 8332 of this title for the purpose of an annuity under subchapter III of chapter 83 of this title. However, an employee who is a retired member of a uniformed service as defined by section 3501 of this title is entitled to credit for active military service only if—

"(A) his retirement was based on disability—

"(i) resulting from injury or disease received in line of duty as a direct result of armed conflict;

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B-136412

"(ii) caused by an instrumentality of war and incurred in line of duty during a period of war as defined by sections 101 and 301 of title 38;

"(B) that service was performed in the armed forces during a war, or in a campaign or expedition for which a campaign badge has been authorized; or

"(C) on November 30, 1964, he was employed in a position to which this subchapter applies and thereafter he continued to be so employed without a break in service of more than 30 days. * * *"

We note that in the codification of title 5 U.S.C. the provisions in section 8332(g) were derived from section 3(d) of the Civil Service Retirement Act as amended July 31, 1956, 5 U.S.C. 2253(d)(1964 ed.) whereas the language quoted from section 6303(a) was derived from a later statute--section 203 of the Dual Compensation Act, Public Law 88-448, approved August 19, 1964.

In our decision of March 9, 1965, B-156095, 44 Comp. Gen. 534, we concluded;

"Thus it is our view that after the effective date (December 1, 1964) of section 203 of Pub. L. 88-448, active service rendered in any of the uniformed services, the Public Health Service or the Coast and Geodetic Survey by a retired member or members of those services is not creditable for purposes of the Annual and Sick Leave Act of 1951, regardless of the time when such service was rendered unless such service is covered by one of the three exceptions specifically enumerated in the said section 203."

As pointed out in the March 9 decision, the legislative history of the Dual Compensation Act, Public Law 88-448, clearly indicates the Congress intended, except as otherwise expressly provided therein, that retired members of the uniformed services who obtain civilian employment while continuing to enjoy retirement benefits based upon their careers in the uniformed services may not be granted benefits in their civilian

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positions on the basis of the time served in such uniformed services. Accordingly, our view is that for annual leave accrual purposes no part of a period of military service intervening between two periods of civilian service may be counted by any employee who is entitled to retired pay as a member of a uniformed service except as expressly provided by 5 U.S.C. 6303(a). While the March 9 decision did not specifically mention 5 U.S.C. 8332(c), we do not consider that section 8332(c) has any application for leave accrual purposes to retired members of the uniformed services who following their retirement are reemployed in civilian positions. Therefore, the question presented is answered in the negative.

Sincerely yours,

FRANK H. WEITZEL

Assistant Comptroller General
of the United States

The Honorable John W. Macy, Jr., Chairman
United States Civil Service Commission

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